

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

Criminal Action

No. 07-369

BRIAN LEE NESTOR,

Defendant.

---

Transcript of proceedings on Friday, February 1, 2008,  
United States District Court, Pittsburgh, Pennsylvania, before  
the Honorable Thomas Hardiman, U.S. Third Circuit Court of  
Appeals Judge.

APPEARANCES:

For the Government: KAY LEE, Esq.

For the Defendant: W. PENN HACKNEY, Esq.

Court Reporter: Shirley Ann Hall, RDR, CRR  
6260 U.S. Courthouse  
Pittsburgh, PA 15219  
(412) 765-0408

Proceedings recorded by mechanical stenography; transcript  
produced by computer-aided transcription.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

P R O C E E D I N G S

\* \* \* \* \*

(In open court.)

THE COURT: Good afternoon. This is the case of United States of America versus Brian Lee Nestor, Criminal No. 07-369.

Mr. Nestor, the Court is informed that pursuant to Rule 11 of the Federal Rules of Criminal Procedure you wish to change the plea you have previously entered to a plea of guilty at Count 2 of the indictment at Criminal No. 07-369. Is that correct, sir?

DEFENDANT NESTOR: Yes.

THE COURT: If you would pull that microphone a little closer to you.

Before accepting your guilty plea on this count, there are a number of questions I will ask you to assure myself that it is a valid plea. If you do not understand any of the questions or at any time wish to consult with your counsel, please say so since it is essential to a valid plea that you understand each and every question before you answer.

Okay?

DEFENDANT NESTOR: Okay.

THE COURT: If the clerk would please administer the oath to the Defendant.

\* \* \* \* \*

BRIAN NESTOR, the defendant herein, having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY THE COURT:

Q. Mr. Nestor, do you understand that, having been sworn, your answers to my questions will be subject to the penalties of perjury or of making a false declaration if you do not answer truthfully?

A. Yes.

MR. HACKNEY: Judge, I'm sorry to interrupt for one minute. I had a thought that disturbed me. Would this plea make the conviction available as impeachment under Rule 609 whereas if we did the plea after the trial, it would not be available?

MS. LEE: I believe it would be available for impeachment under 609.

MR. HACKNEY: Then I would move to permit the plea to be entered after the trial.

MS. LEE: Your Honor, if we wait until after the trial, jeopardy would attach.

MR. HACKNEY: Not to the second count.

MS. LEE: The trial is supposed to go forward on both counts.

THE COURT: I thought the motion for severance was

1 denied.

2 MR. HACKNEY: It was, but Your Honor has --

3 THE COURT: If we went -- picked the jury Monday and  
4 went to trial only on Count 1 and not Count 2, that would be  
5 in effect severing the counts.

6 MR. HACKNEY: Yes, and your Honor has the power to  
7 do that. You are the gatekeeper for the trial matter.

8 THE COURT: That's already been denied though.

9 MR. HACKNEY: Judge Ambrose denied it.

10 THE COURT: Right.

11 MS. LEE: Your Honor, could I have a minute --

12 THE COURT: Why don't we have --

13 MS. LEE: Could we talk off the record for a second?

14 THE COURT: Certainly.

15 (Off the record discussion between counsel.)

16 MS. LEE: The Government would be willing to refrain  
17 from using this particular guilty plea as 609 -- as  
18 impeachment material. We do, however, reserve the right to  
19 talk about the evidence with regard to all of the possession  
20 of child pornography to the extent the judge would let it in  
21 under 404 for the enticement count.

22 THE COURT: Is that acceptable to you, Mr. Hackney?

23 MR. HACKNEY: Yes, Your Honor.

24 THE COURT: All right.

25 So we're clear, the fact of this guilty plea will

1 not be admissible under 609, but the conduct that forms the  
2 basis of the guilty plea will be admissible under 404(b),  
3 subject to the usual evidentiary objections.

4 MR. HACKNEY: Yes, sir. I mean not that it would be  
5 admissible, but the Government wouldn't be precluded by its  
6 agreement from offering it, from trying to get it in.

7 THE COURT: Right.

8 MR. HACKNEY: And the thesis will be that the  
9 e-mails on the Yahoo account beginning in July of '06 through  
10 his arrest in September of '07 are all relevant and admissible  
11 and -- but prior to that I will be arguing are not admissible  
12 because they're not relevant -- sufficiently relevant given  
13 their prejudice; but that's a question that is not yet  
14 resolved and would not be affected by the Government's  
15 agreement.

16 MS. LEE: Right. The Government obviously has a  
17 different view of the admissibility of all that under 404(b),  
18 but I think that is a different question for another time,  
19 probably during the course of the trial.

20 THE COURT: All right. But the Government  
21 stipulates not to attempt to offer into evidence at trial the  
22 fact of this guilty plea as to Count 2.

23 MS. LEE: Yes, that's correct.

24 THE COURT: All right.

25 MR. HACKNEY: Then we can proceed. I withdraw my

1 motion.

2 THE COURT: All right. Thank you, Mr. Hackney.

3 BY THE COURT:

4 Q. Mr. Nestor, would you state your complete and true name  
5 for the record.

6 A. Brian Lee Nestor.

7 Q. What is your present home address?

8 A. Well, 770 Melbourne Street, Pittsburgh, PA, 15217.

9 Q. How old are you?

10 A. 44.

11 Q. What is the extent of your education?

12 A. I have a bachelor's degree from Indiana University and  
13 I have about -- I don't know -- twelve credits earned toward  
14 my masters at Duquesne University.

15 Q. Can you read, write, and understand the English  
16 language?

17 A. Yes.

18 Q. Have you had any drugs, medication, and/or alcohol  
19 within the last 48 hours?

20 A. No.

21 Q. Are you now or have you recently been under the care of  
22 a physician or a psychiatrist?

23 A. No.

24 Q. Are you now or have you recently been hospitalized or  
25 treated for narcotic addiction?

1 A. No.

2 Q. Are you pleading guilty to Count 2 of an indictment at  
3 Criminal No. 07-369?

4 A. Yes.

5 Q. You are charged in Count 2 with possession of material  
6 depicting the sexual exploitation of a minor in violation of  
7 Title 18, United States Code, Section 2252(a)(4)(B). Have you  
8 read and reviewed the entire indictment with your counsel?

9 A. Yes.

10 Q. And you've read the superseding indictment as well?

11 A. Yes.

12 THE COURT: Is that correct, Mr. Hackney?

13 MR. HACKNEY: Yes, sir.

14 BY THE COURT:

15 Q. Mr. Nestor, do you completely understand the charges  
16 against you as contained in the indictment and the superseding  
17 indictment?

18 A. Yes.

19 Q. Do you have any questions about the crimes charged  
20 against you in the indictment?

21 A. No.

22 Q. Is it your intention to plead guilty today to Count 2  
23 of the indictment?

24 A. Yes.

25 THE COURT: And just so I'm clear, Mr. Hackney, this

1 is Count 2 of the original indictment or is it Count 2 of the  
2 superseding?

3 MR. HACKNEY: It's the identical count, Your Honor.  
4 The only change made in the superseding indictment was to  
5 Count 1.

6 THE COURT: All right.

7 MR. HACKNEY: So for these purposes it's the same  
8 language.

9 THE COURT: In both.

10 MR. HACKNEY: Yes.

11 THE COURT: All right, thank you.

12 BY THE COURT:

13 Q. Mr. Nestor, I'm going to explain to you now the rights  
14 you'll be giving up if you choose to plead guilty.

15 Do you understand that if you would plead not guilty,  
16 you would have the right to be assisted by an attorney at the  
17 trial of this charge?

18 A. Yes.

19 Q. Do you understand that you have the right to plead not  
20 guilty and to persist in that plea if it has already been  
21 entered; and that if you plead not guilty and if you are  
22 unable to afford an attorney, you are entitled to be assisted  
23 by an attorney at no cost to you at all phases of the  
24 processing of the charges against you including the trial and  
25 on appeal?



1 A. Yes.

2 Q. Do you understand that under the Constitution and laws  
3 of the United States, you are entitled to a speedy trial by a  
4 judge and jury on the charges against you?

5 A. Yes.

6 Q. Do you understand that at the trial you would be  
7 presumed to be innocent?

8 A. Yes.

9 Q. Do you understand that at the trial you would not have  
10 to prove that you were innocent?

11 A. Yes.

12 Q. Do you understand that at the trial the Government  
13 would be required to prove your guilt by competent evidence  
14 and beyond a reasonable doubt before you could be found  
15 guilty?

16 A. Yes.

17 Q. Do you understand that at the trial the jury must be  
18 unanimous in order to find you guilty on the charge against  
19 you?

20 A. Yes.

21 Q. Do you understand that you would have the right to  
22 participate in the selection of the jury and that you would  
23 have the right to strike or eliminate any prospective juror if  
24 it is established that the juror is unable to render a fair  
25 and impartial verdict in your case; and that, in addition, you

1 would have the right to strike ten jurors without assigning  
2 any reason at all?

3 A. Yes.

4 Q. Do you understand that in the course of the trial the  
5 witnesses for the Government would have to come to court and  
6 testify in your presence?

7 A. Yes.

8 Q. Do you understand that in the course of the trial your  
9 counsel, Mr. Hackney, would cross examine witnesses for the  
10 Government, object to evidence offered by the Government, and  
11 then perhaps offer evidence on your behalf?

12 A. Yes.

13 Q. Do you understand that at the trial you would have the  
14 right to call witnesses to present your side of the case and  
15 you can compel their attendance by the use of the subpoena  
16 power which is also available to you?

17 A. Yes.

18 Q. Do you understand that in the course of the trial, if  
19 you qualify as being financially unable to pay witness fees to  
20 witnesses you wished to call on your behalf, the Government  
21 would pay those witness fees for you?

22 A. Yes.

23 Q. Do you understand also that at the trial you would have  
24 the right to testify if you chose to do so?

25 A. Yes.

1 Q. Do you understand that at the trial you would also have  
2 the right not to testify and no inference or suggestion of  
3 guilt could be drawn from the fact that you did not testify?

4 A. Yes.

5 Q. Mr. Nestor, if you plead guilty and I accept your plea,  
6 do you understand that you will waive your right to a trial on  
7 this charge and the other rights I have just discussed, there  
8 will be no trial on this charge, a judgment of guilt will be  
9 entered, and you will be sentenced based on your guilty plea  
10 after a presentence report is prepared by the Probation  
11 Office?

12 A. Yes.

13 Q. If you plead guilty and I accept your plea, do you  
14 understand that you will also have to waive your right not to  
15 incriminate yourself since I may ask you questions about what  
16 you did in order to satisfy myself that you are guilty as  
17 charged and that you will have to acknowledge your guilt?

18 A. Yes.

19 Q. Having discussed your rights with you, Mr. Nestor, do  
20 you still wish to plead guilty?

21 A. Yes.

22 Q. The maximum sentence or penalties under the law that  
23 may be imposed upon you by the Court for the commission of the  
24 crime to which you are pleading guilty are any or all of the  
25 following: As to Count 2, a fine or a term of imprisonment of

1 not more than ten years or both. If the Defendant has a prior  
2 conviction under Title 18, United States Code, Chapter 71,  
3 109(a), 110 or 117, or under Title 10, United States Code,  
4 Section 920, or under the laws of any state relating to  
5 aggravated sexual abuse, sexual abuse or abusive sexual  
6 conduct involving a minor or a ward, or the production,  
7 possession, receipt, mailing, sale, distribution, shipment, or  
8 transportation of child pornography, then the Defendant shall  
9 be fined and imprisoned for not less than ten years, nor more  
10 than twenty years.

11 Mr. Nestor, do you understand the maximum sentence and  
12 penalties for the charge to which you are pleading guilty?

13 A. Yes.

14 Q. If you are sentenced to prison and the sentence  
15 includes a term of supervised release, do you understand that  
16 if you violate the conditions of supervised release, the Court  
17 may take any of the following actions: First, do you  
18 understand that the term of supervised release may be extended  
19 if the term previously imposed was less than the maximum  
20 authorized term of supervised release?

21 A. Yes.

22 Q. Do you understand that the Court may modify, reduce, or  
23 enlarge the conditions of supervised release?

24 A. Yes.

25 Q. Or that the Court may also revoke your term of

1 supervised release and you may be imprisoned up to all or part  
2 of the term of the supervised release that was originally  
3 authorized for the offense that resulted in your sentence of  
4 supervised release without any credit for time you have  
5 already spent on supervised release or in combination of  
6 imprisonment followed by a term of supervised release so long  
7 as the combination does not exceed the original authorized  
8 term of supervised release?

9           For example, if the term of supervised release that was  
10 originally authorized was life and the term imposed by the  
11 Court was five years, then you may be imprisoned for a term up  
12 to life for the violation. Do you understand that?

13 A.       Yes.

14 Q.       The Court notes for the record that in early 2005 the  
15 Supreme Court of the United States in *United States versus*  
16 *Booker* invalidated the sentencing guidelines as historically  
17 applied and held that the guideline ranges were merely  
18 advisory.

19           Under this Court's interpretation of *Booker*, a  
20 sentencing judge is required to consider the applicable  
21 guideline range in determining a sentence, but possesses broad  
22 discretion to sentence based on the circumstances of each case  
23 so long as the sentence imposed is within the statutory range  
24 and is reasonable.

25           Mr. Nestor, do you understand that because the offense

1 with which you are charged in the indictment and the  
2 superseding indictment occurred after November 1, 1987, that  
3 the Court would consider the sentencing guidelines promulgated  
4 or adopted by the United States Sentencing Commission in  
5 determining your sentence?

6 A. Yes.

7 Q. Have you and your attorney discussed how the guidelines  
8 might apply in your case?

9 A. Yes.

10 THE COURT: Is that correct, Mr. Hackney?

11 MR. HACKNEY: It is, sir.

12 BY THE COURT:

13 Q. Do you understand that the Court will not be able to  
14 determine the guidelines for your case until after the  
15 presentence report has been completed and the Government and  
16 you have had an opportunity to challenge the reported facts  
17 and the application of the guidelines recommended by the  
18 Probation Office; and, further, that the sentence imposed may  
19 be different from any estimate that your attorney may have  
20 given you?

21 A. Yes.

22 THE COURT: Miss Lee, what is the Government's  
23 position as to the applicable guidelines range on this count?

24 MS. LEE: Your Honor, the Government believes that  
25 the guideline range is, I believe, 70 to 81 months. I don't

1 have my guidelines in front of me, I apologize, but I do  
2 believe that's the applicable guideline range.

3 THE COURT: Mr. Hackney, what is the Defendant's  
4 position?

5 MR. HACKNEY: Your Honor, with the base offense  
6 level of 18, plus two for use of a computer, plus two for  
7 prepubescent minor in one of the pictures, one of the movies,  
8 plus five because there were at least eight movies, and each  
9 movie is counted as 75 images, so you're more than 600 images,  
10 and that becomes a Level 27, Your Honor. As we discussed at  
11 the pretrial conference, the guilty plea, the Government  
12 doesn't plan to object to the full three-level reduction, and  
13 that would be level 24. Mr. Nestor has no prior record, which  
14 results in a range of 51 to 63 months.

15 THE COURT: All right.

16 And, Miss Lee, just to confirm, the Government is  
17 agreeing to the three-level reduction, is that correct?

18 MS. LEE: That is correct, Your Honor. And my  
19 guideline range that I believed was appropriate did not factor  
20 in that, the reduction for acceptance of responsibility.

21 MR. HACKNEY: That's correct.

22 MS. LEE: Just to be clear.

23 THE COURT: So our understanding is Mr. Hackney has  
24 correctly --

25 MS. LEE: That's correct.

1 THE COURT: Okay.

2 BY MR. HACKNEY:

3 Q. Mr. Nestor, do you understand that after it has been  
4 determined what guidelines range applies to a case, the judge  
5 has the authority to vary from that guidelines range and  
6 impose a sentence that is more severe -- that is longer -- or  
7 less severe -- that is shorter -- than that called for by the  
8 guidelines so long as the sentence imposed is within the  
9 statutory range and is reasonable?

10 A. Yes.

11 Q. Do you also understand that unless waived by agreement,  
12 you or the Government may have the right to appeal any  
13 sentence that is imposed?

14 A. Yes.

15 Q. Do you also understand that, under the guidelines,  
16 parole has been abolished; and that if you are sentenced to  
17 prison, you will not be eligible for parole?

18 A. Yes.

19 Q. A Defendant must serve the sentence imposed by the  
20 Court provided, however, that after the first year of a  
21 sentence, a Defendant may earn up to 54 days of good time for  
22 each additional year of the sentence imposed.

23 Mr. Nestor, do you understand that the offense to which  
24 you are pleading guilty is a felony offense?

25 A. Yes.



1 Q. Do you understand that if your plea is accepted, you  
2 will be adjudged guilty of the offense?

3 A. Yes.

4 Q. And that such adjudication may deprive you of certain  
5 valuable civil rights such as the right to vote, the right to  
6 hold public office, the right to serve on a jury, and the  
7 right to possess any kind of a firearm?

8 A. Yes.

9 THE COURT: At this time I would ask that the plea  
10 agreement be handed to Mr. Nestor.

11 MS. LEE: There is no plea agreement.

12 THE COURT: There is no written plea agreement?

13 MS. LEE: That's correct.

14 THE COURT: All right.

15 BY THE COURT:

16 Q. Mr. Nestor, other than -- strike that.

17 Mr. Nestor, have you been instructed by your counsel,  
18 Government counsel, or anyone else to respond untruthfully to  
19 any question concerning a promised sentence?

20 A. No.

21 Q. Has anyone made any prediction or promise to you as to  
22 what your sentence will be?

23 A. No.

24 Q. And to confirm, you've not been instructed by your  
25 counsel or anyone else to respond untruthfully to any question

1 concerning a promised sentence.

2 A. No.

3 THE COURT: Miss Lee, as Assistant United States  
4 Attorney on this case, will you now please place on the record  
5 the elements of the offense to which Brian Lee Nestor is  
6 pleading guilty so it will be clear to him and on the record  
7 that he understands the nature of the offense to which he may  
8 be entering a plea of guilty.

9 MS. LEE: Certainly, Your Honor.

10 For the crime of possession of materials depicting  
11 the sexual exploitation of a minor in violation of Title 18,  
12 United States Code, Section 2252(a)(4)(B), the Government must  
13 prove, one, that the Defendant knowingly possessed one or more  
14 items which contained a visual depiction of a minor engaging  
15 in sexually explicit conduct.

16 Two, that the item which contained the visual  
17 depiction had been mailed, transported, or shipped in  
18 interstate commerce or had been produced using materials which  
19 had been mailed or transported or shipped in interstate  
20 commerce.

21 And, three, that the production of the visual  
22 depiction involved the use of a minor engaging in sexually  
23 explicit conduct as those terms are defined in Title 18,  
24 United States Code, Section 2256.

25 THE COURT: Thank you, Ms. Lee.

1 BY THE COURT:

2 Q. Mr. Nestor, do you understand that before you could be  
3 found guilty of the offense to which you are entering a plea  
4 of guilty, the Government would have to prove all of the  
5 elements of the crime beyond a reasonable doubt?

6 A. Yes.

7 THE COURT: Miss Lee, what in summary would be the  
8 Government's evidence as to the charge?

9 MS. LEE: Your Honor, the Government would prove the  
10 following if so required at trial. On March 2<sup>nd</sup>, 2005,  
11 Federal Bureau of Investigation Special Agents Karen Spazinski  
12 and Matthew Bowman went to the Defendant's apartment in the  
13 Shadyside section of Pittsburgh to interview him. They went  
14 to talk to him because they had received a tip that the  
15 Defendant was boasting over an Internet chat room that he had  
16 molested a young boy.

17 When they got to the apartment, the agents talked to  
18 him about the tip and about the possession of child  
19 pornography in general, and it was during this interview that  
20 the Defendant admitted that he had downloaded and viewed child  
21 pornography in the past and that he was most interested in mid  
22 to late teen boys.

23 While the agents were there, the Defendant excused  
24 himself from the interview and left the room purportedly to  
25 retrieve a cell phone, and it was during this time when he was

1 out of the room that the agents heard the sounds of a  
2 miscellaneous clicking on the Defendant's computer. After  
3 this, the Defendant stated to the agents that he was sure that  
4 there would be no child pornography on the computer and  
5 consented to a search of the computer.

6 On March 3<sup>rd</sup> of 2005, the next day, forensic  
7 computer examiners at the FBI examined the Defendant's  
8 computer. And it was during that examination where they  
9 retrieved deleted pornographic movies and still images from  
10 the Defendant's hard drive.

11 In total, there were numerous pornographic videos,  
12 at least 18 of which clearly depicted prepubescent and teenage  
13 minors engaging in sexual activity, and there are also  
14 thousands of still images on the Defendant's hard drive, many  
15 of which also contained images of minors engaging in sexual  
16 activity.

17 The titles of these videos and images frequently  
18 contained specific ages regarding the ages of the people  
19 depicted in the videos. For example, the title would indicate  
20 if it was a 9-year-old, a 14-year-old, et cetera. And some of  
21 the videos and pictures also had titles that contained general  
22 age ranges of the individuals in the videos such as preteen or  
23 teen, et cetera.

24 When the FBI examiners examined the deleted videos  
25 in detail, they discovered that the videos -- many of the

1 videos had a last access date of March 2<sup>nd</sup> at around  
2 9:30 a.m., meaning that those videos were last accessed --  
3 either viewed or otherwise accessed approximately an hour  
4 before the agents came to the Defendant's house on  
5 March 2<sup>nd</sup>, 2005.

6           The Government would prove that these videos and  
7 still images did, in fact, contain images depicting minors  
8 engaging in sexually explicit conduct in violation of  
9 Title 18, United States Code, Section 2256. The videos were  
10 downloaded from the Internet and were saved in a file on the  
11 Defendant's hard drive -- a specific file on the Defendant's  
12 hard drive.

13           Some were also in the form of temporary Internet  
14 files, meaning he didn't necessarily download the videos onto  
15 his computer, but that he viewed them from his computer from  
16 the Internet. The still pictures were contained in a file  
17 entitled "My Shared Folder" under the Kazaa folder of the  
18 Defendant's hard drive. Kazaa is a peer-to-peer file sharing  
19 network where the users use the Internet to share and exchange  
20 videos and files and images.

21           In addition, the Government will prove that the  
22 Defendant communicated in chat rooms during this same time  
23 period, the February, March, 2005, time period. And in those  
24 chat rooms he would say that he was either looking for child  
25 pornography or he was describing the child pornography that he

1 had in his possession. In addition, there are e-mails in 2006  
2 and 2007 in which the Defendant describes how he used to use  
3 Kazaa to download child pornography videos and images onto his  
4 computer.

5 That's the summary of what the Government would  
6 prove if required to at trial.

7 THE COURT: Thank you, Miss Lee.

8 BY THE COURT:

9 Q. Mr. Nestor, I intend to ask you whether you agree with  
10 the Government's summary of what you did; but before I ask, do  
11 you understand that your answers may later be used against you  
12 in a prosecution for perjury or false statement if you do not  
13 answer truthfully?

14 MR. HACKNEY: Judge, may I ask to interrupt again?  
15 Because there's an upcoming trial where Mr. Nestor does intend  
16 to testify, he's not going to assent to all of the facts that  
17 Miss Lee mentioned. He assents absolutely that he knowingly  
18 possessed some of those movies on his computer at some point  
19 prior to March 2 and on March 2, 2005. But I just can't let  
20 him make a blanket assent to all of that rendition of facts  
21 because I don't know how much of it might be relevant at the  
22 trial, if any.

23 THE COURT: All right.

24 BY THE COURT:

25 Q. Mr. Nestor, do you agree with what Mr. Hackney just

1 said, that you admit to possessing the child pornography  
2 images on your computer?

3 (Off the record discussion between Defendant and  
4 counsel.)

5 BY THE COURT:

6 A. Yes. Yes.

7 Q. All right. And without reference to any specific  
8 statements that Ms. Lee made, do you agree generally with the  
9 summary of what she has articulated that you did?

10 MR. HACKNEY: Yes, sir; that was the evidence  
11 presented at the suppression hearing.

12 DEFENDANT NESTOR: I agree to --

13 THE COURT: Mr. Hackney, I gather from what you're  
14 interjecting that you want to make sure that by laying a  
15 factual predicate for me to accept the guilty plea on Count 2,  
16 Mr. Nestor is not deemed to be admitting any facts that the  
17 Government may attempt to offer into evidence at the trial.

18 MR. HACKNEY: That's exactly correct, sir.

19 THE COURT: All right.

20 MR. HACKNEY: But he admits knowingly possessing  
21 child pornography on March 2, 2005.

22 THE COURT: All right.

23 BY THE COURT:

24 Q. Is that correct Mr. Nestor?

25 A. Yes, I -- I -- I agree to the -- to -- to the

1 possession, but I --

2 Q. Okay. Mr. Nestor, the Court finds, then, there is a  
3 factual basis to accept your guilty plea as to Count 2 of the  
4 superseding indictment at Criminal No. 07-369 if the same is  
5 entered herein. Do you still wish to plead guilty to Count 2,  
6 Mr. Nestor?

7 A. Yes.

8 THE COURT: Mr. Hackney, is this consistent with  
9 your advice?

10 MR. HACKNEY: It is, sir.

11 BY THE COURT:

12 Q. Mr. Nestor, has anyone forced you in any way to enter a  
13 plea to this charge?

14 A. No.

15 Q. Has anyone offered you or promised you anything in  
16 order to get you to enter a plea to the charge other than what  
17 is set forth in -- strike that.

18 Has anyone offered you or promised you anything in  
19 order to get you to enter a plea to the charge?

20 A. No.

21 Q. So if you enter a plea of guilty, would it be your own  
22 free and voluntary act?

23 A. Yes.

24 Q. Do you understand everything that I have discussed with  
25 you today?



1 A. Yes.

2 Q. Have you ever had any physical or mental illness that  
3 would or might affect your ability to understand these rights  
4 or affect the voluntary nature of your plea?

5 A. No.

6 Q. Are you satisfied in all respects with the advice and  
7 representation of your counsel?

8 A. Yes.

9 THE COURT: Miss Lee, would you now place -- strike  
10 that --

11 BY THE COURT:

12 Q. Mr. Nestor, are you now on probation or parole or were  
13 you on probation or parole at the time of the offense?

14 A. No.

15 Q. Have you answered truthfully to all of the questions I  
16 have asked you today?

17 A. Yes.

18 Q. Mr. Nestor, you are charged by the United States of  
19 America in Count 2 of the superseding indictment at Criminal  
20 No. 07-369 with possession of material depicting the sexual  
21 exploitation of a minor in violation of Title 18,  
22 United States Code, Section 2252(a)(4)(B). How do you plead  
23 to Count 2?

24 A. Guilty.

25 THE COURT: Mr. Nestor, the Court finds that you are

1 competent, that you know and understand your right to a jury  
2 trial, and the consequences of waiving that right, and that  
3 you know what the maximum sentence and penalty are. The Court  
4 therefore accepts your guilty plea and hereby adjudges you  
5 guilty of the crime set forth in Count 2 of the superseding  
6 indictment at Criminal No. 07-369.

7 At this time I would ask that the Defendant sign the  
8 change of plea form.

9 (Change of plea form signed.)

10 THE COURT: The Court notes for the record the  
11 signature of the Defendant, Brian Lee Nestor, and his counsel,  
12 Penn Hackney, on the change of plea form.

13 Mr. Nestor, the Court orders a presentence  
14 investigation report which will be important to the Court in  
15 its decision as to what your sentence will be. Pursuant to  
16 local Criminal Rule 32.1, you and your attorney will have an  
17 opportunity to examine the report. At the time of sentencing  
18 you will have the right and the opportunity to present  
19 information to the Court concerning matters in the report  
20 which you dispute.

21 It is ordered that the Probation Office shall  
22 provide the Court with a copy of the initial presentence  
23 report at the time the Probation Office furnishes the report  
24 to counsel for the Defendant and the Assistant United States  
25 Attorney. Counsel should be aware of the provisions set forth

1 in local Rule 32.1 concerning resolution of disputes  
2 concerning factors relevant to the sentencing.

3 Disposition of sentencing in this case is set for  
4 Friday, May 9, 2008, at 1:30 p.m.

5 MR. HACKNEY: I'm sorry, sir, which date?

6 THE COURT: Friday, May 9, 2008, at 1:30 p.m.

7 As I indicated to counsel earlier, I've made  
8 modifications to the proposed voir dire for jury selection on  
9 Monday, and I would ask you to coordinate at the conclusion of  
10 this hearing with my law clerks so they can e-mail you the  
11 updated versions of the voir dire.

12 Why don't we meet in my chambers at 8:45 a.m. on  
13 Monday to wrap up any loose ends relative to jury selection.  
14 And we will pick the jury as soon as practicable on Monday.  
15 If things go smoothly, I'd anticipate picking the jury in the  
16 morning, having a luncheon recess, then beginning the trial  
17 Monday afternoon; but we'll have to see how jury selection  
18 proceeds.

19 Anything else at this time on behalf of Government,  
20 Miss Lee?

21 MS. LEE: One other thing, Your Honor. As we  
22 discussed in the pretrial conference earlier today, the  
23 Government has the binders of the e-mails that we mentioned  
24 for Your Honor if you would like them.

25 THE COURT: Yes, if you'd give them to my law clerks

1 as well.

2 Anything else, Miss Lee?

3 MS. LEE: Nothing from the Government.

4 THE COURT: Mr. Hackney, anything further on behalf  
5 of Defendant?

6 MR. HACKNEY: No, sir.

7 THE COURT: This matter is adjourned.

8 (Whereupon, at 12:45 p.m., court was adjourned.)

9 \* \* \* \* \*

10 C E R T I F I C A T E

11 I, Shirley Ann Hall, certify that the foregoing  
12 is a correct transcript from the record of proceedings in the  
13 above-titled matter.

14 s/Shirley Ann Hall  
15 Shirley Ann Hall, RDR, CRR  
16 Official Reporter  
17  
18  
19  
20  
21  
22  
23  
24  
25